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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARTIN H. DROZ,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEAL

MARTIN H. DROZ
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35PP

QUESTION PRESENTED

DOES THE SOCIAL SECURITY TAX EXEMPTION FOR RELIGIOUS ORGANIZATIONS IN 26 U.S.C. §1402(g) VIOLATE THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE, THE ESTABLISHMENT CLAUSE, OR 'EQUAL PROTECTION' UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

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PUBLICATION OF OPINIONS BELOW

The opinion of the appellate court is published at 48 F.3d 1120, along with the order denying the petition for rehearing. It is reprinted in the appendix (p. 17). The order and opinion of the Tax Court is not published and is reprinted in the appendix (p. 10).

JURISDICTIONAL GROUNDS

Petitioner, Martin H. Droz, in proper person, respectfully petitions this Court for a Writ of Certiorari to review the judgement rendered in this case by the Ninth Circuit Court of Appeals. The opinion was entered on March 1, 1995. Rehearing was denied, and the opinion amended June 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

LEGAL PROVISIONS INVOLVED

The legal provisions involved are the religion clauses of First Amendment to the U.S. Constitution and 26 U.S.C. 1402(g)(1). The provisions are reprinted as follows:

First Amendment, U.S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,....

26 U.S.C. 1402(g)(1). Members of Certain religious faiths.

(1) **Exemption.** Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to the acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-

age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by--

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect or division thereof as the Secretary may require for purposes of determining such individual's compliance with the preceding sentence, and

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any person, and only if the Commissioner of Social Security[1] finds that--

(C) such sect or division thereof has established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for the members of such sect or division thereof to make provision for their dependent members which in his judgement is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence at all times since December 31, 1950.

An exemption may not be granted to any individual if any benefit or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act would have become payable) at or before the time of the filing of such waiver.

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[1] Prior to 3/31/95, the phrase read "Secretary of Health and Human Services".

STATEMENT OF THE CASE

This case involves a dispute over the exemption from self-employment (social security) tax under the above statute. Petitioner Droz timely filed a tax return for 1988 indicating self-employment income. However, no schedule was included reflecting any computation of self-employment tax. On June 28, 1991 the Internal Revenue Service (IRS) issued Droz a deficiency notice for said tax. On August 7, 1991 Droz submitted an application for exemption from self-employment tax.[2] The application was based on Droz religious beliefs which prohibited him from participating in the Social Security program. In accordance with the application form, Droz also waived all benefits from the Social Security system. The government took no action on the application, neither approving nor denying it.

Droz timely filed a petition with the Tax Court for redetermination of the deficiency. It had jurisdiction under 26 U.S.C. §6214(a). The Tax Court determined Droz was not entitled to the exemption because of (i) lack of membership in a religious organization, and (ii) lack of a timely filed application.[3]

In both the Tax Court and on appeal, Droz argued the religious organization membership requirement of §1402(g) violated the 'Free Exercise' clause of the First Amendment pursuant to this Court's decision in *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989). He also argued the statute violated the 'Establishment' clause, as well as equal

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[2] Although not part of the record below, this was the third such application submitted by Droz upon which no action had been taken. A prior application had been submitted April 6, 1990, with another made before that.

[3] The government conceded on appeal that the Tax Court's ruling on the timeliness of Droz' application was wrong.

protection under the Due Process Clause of the Fifth Amendment because it was underinclusive.

In affirming the decision of the Tax Court, the Ninth Circuit held that Droz' Free Exercise challenge failed due to the government's "compelling interest in enforcing participation in the Social Security system" and because Droz is not a member of "any religious organization that provides for its dependent members." It held the Establishment Clause challenge to §1402(g) failed because the statute "does not discriminate among religions", but instead is "a religious exemption narrowly drawn to ... ensure that all persons are provided for, either by the Social Security system or by their church." It also held the equal protection/ Due Process challenge to §1402(g) failed because the purpose of the statute is secular, and is rationally related to legitimate governmental objectives.

REASONS FOR GRANTING THE PETITION

As an initial matter, this Court should grant certiorari in this case because the appellate court has rendered a decision which unavoidably conflicts with this Court's decision in *Texas Monthly v. Bullock*, (1989) 489 U.S. 1, 103 L.Ed.2d 1, 109 S.Ct. 890. In *Bullock*, this Court held a sales tax exemption aimed solely at religious organizations violated the Establishment Clause of the First Amendment. Moreover, the Court held that the Establishment Clause is violated where a benefit (including tax exemptions) is directed solely to religious organizations that is not required by the Free Exercise Clause, and either substantially burdens non-beneficiaries, or cannot reasonably be seen as removing a significant state imposed deterrent to the free exercise of religion. *Id* at 11-12, 15, and 18 (note 8).

Other than the type of tax involved here, the case at bar is very similar to that in *Bullock*.[4] It is simply indisputable that

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the exemption statute in question here (§1402(g)) is aimed solely at religious organizations since membership in (and subscription to the beliefs of) such an organization are not only requirements, but *fundamental* requirements. Therefore, this exemption could not be classified as anything but 'religious'.

In addition to the exemption being exclusively religious, the non-beneficiaries of the social security exemption are certainly no less burdened than the non-beneficiaries of the sales tax exemption in *Bullock*. This is particularly true since social security is applied to the very livelihood of most individuals (i.e. their wages, salary, or self-employment income) as opposed to the payment of a mere sales tax on the (discretionary) purchase of religious publications. Consequently, the social security exemption in §1402(g) would be a violation of the Establishment Clause under *Bullock* unless the purpose of the statute is to protect conduct under the Free Exercise Clause.

In *United States v. Lee*, 455 U.S. 252 (1982) this Court held the Free Exercise Clause did not require an exemption from social security taxes for an Amish employer (or anyone else). In that case, the exact same exemption was at issue. However, since the exemption did not apply to Mr. Lee at the time because he employed others,[5] the Court had no necessity to, and in fact specifically declined to decide whether the exemption was compelled under the Free Exercise Clause.

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[4] This Court made no distinction in *Bullock* among the types of (tax) exemptions which may be involved. Instead, it determined the breadth of a tax exemption to be the critical factor.

[5] As the appellate court noted, after *Lee* was decided, Congress extended the exemption to situations where both employer and employee are members of a 'recognized religious sect' that opposes social security.

Lee, 455 U.S. at 260 (note 11).[6] Although, the Court stated in its dictum that the exemption was an effort by Congress to accommodate those opposed to social security on religious grounds, *Id*, it never did rule whether §1402(g) did in fact comply with any requirements for Free Exercise and/or Establishment Clause legislation, nor whether it afforded equal protection under the Due Process Clause of the Fifth Amendment. These questions are now before this Court.

As several members of this Court recognized in *Bullock*, there is tension between the Free Exercise Clause and the Establishment Clause. While the former may suggest a religious exemption may be required, the latter may suggests such an exemption is prohibited. 489 U.S. at 27, 42. If this Court's decision in *Board of Education of Kiryas Joel v. Grumet*, (1994) 114 S.Ct. 2481 is any indication of how this case might be decided, its 'neutrality' toward religion standard for either of the above clauses would no doubt render the instant exemption invalid. However, in view of the Congressional command for restoration of the "compelling interest" vs. "least restrictive means" test in the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §2000bb, et seq., it is questionable that 'neutrality' would be the proper standard for review of at least the Free Exercise issue.[7]

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[6] Relying in part on statements made by this Court in *Lee*, the appellate court held §1402(g) does not violate the Establishment Clause of the First Amendment. However, the lower court's reliance on *Lee* is seriously misplaced since this Court specifically stated it declined to determine whether conflicts with the Establishment Clause would arise regarding the statute. *Lee*, 455 U.S. at 260 (note 11).

[7] By its terms, the RFRA does not apply to the Establishment Clause. 42 U.S.C. §2000bb-4. It does not appear

Assuming the Court would apply the test under the RFRA, and assuming the exemption is for the purpose of accommodation under the Free Exercise Clause, it discriminates based on membership in a religious organization. Indeed, one of the reasons the appellate court ruled against Droz on this issue was because "Droz does not belong to any religious organization...." (Pet. 25).[8] However, in *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989), this Court emphatically rejected the idea that one must be responding to commands of a particular religious organization in order for the Free Exercise Clause to apply. *Id* at 834. Thus, under *Frazee*, membership in a religious organization appears to be an impermissible factor for Free Exercise purposes. Just because one does not belong to an organization does not make that person's beliefs or practices any less religious, nor any less significant. cf *Seeger v. United States*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1966). It would follow, therefore, that Congress would not be allowed to discriminate based on religious organization membership and still maintain the required 'neutrality' *among* religions required

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that anyone has brought the RFRA to this Court's attention as of its decision in *Kiryas Joel*, supra (1994).

[8] Also, in attempting to distinguish the Free Exercise issue in this case from the situation presented to this Court in *Frazee*, supra, the appellate court held the "denial of a tax exemption is an entirely different burden" than a denial of unemployment benefits. However, this Court has held any "tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious 'donors'." *Bullock*, supra, 489 U.S. at 14, citing *Bob Jones University v. United States*, (1983) 461 U.S. 574, 591. Thus, according to this Court, there is no real difference between denial of a benefit as a payment or denial of a benefit as a tax exemption.

by the Establishment Clause.

This Court has stated it subjects governmental classifications based on religion to the most exacting scrutiny. *Larsen v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683 (1982). Here, Congress treats the beliefs and practices of a religious individual differently than those of a group. This type of distinction is nonetheless discrimination among religions. It results in disparate treatment of religious practices, making special exceptions for religious organizations, while leaving individuals with identical beliefs to be the "slighted members of the community." *Bullock*, 489 U.S. at 15. Therefore, contrary to the appellate court's conclusion (Pet. 26), a 'strict scrutiny' analysis does apply to this case, as opposed to the test under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971) .[9] Further, just as the statute in *Larsen* was held

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[9] However, even if the *Lemon* test did apply, the lower court made an improper analysis under it. While this Court has held that benefits confined solely to religious organizations necessarily lack a secular legislative purpose, *Bullock*, supra, 489 U.S. at 11 (thereby violating the first prong of Lemon), the lower court nonetheless held that the exemption in §1402(g) does have a secular purpose even though it is confined solely to religious organizations. Also, the lower court held that this exemption neither advances nor inhibits religion (second prong of *Lemon*). However, in *Bullock*, this Court rejected the argument that a tax exemption confined solely to religious organizations neither advances nor inhibits religion. 489 U.S. at 20 and 28. The third prong of *Lemon* prohibits statutes that foster excessive entanglement with religion. The fact that this statute does foster such entanglement is evidenced by such cases as *Jaggard v. Commissioner*, 582 F.2d 1189, 1190 (8th Cir. 1978), and *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1336, 1339, 1341-42 (3rd Cir. 1987), where denial of the instant exemption was because the organizations, although otherwise qualified, were not a "recognized religious sect". Since Congress has not (and cannot) set forth any standards for "recognizing" a religious sect in §1402 (g),

invalid, the religiously discriminatory exemption in the case at bar is equally invalid.

CONCLUSION

From the above, it is obvious that the social security exemption under §1402(g) is exclusively religious, inherently underinclusive, and therefore, violative of the Establishment Clause under this Court's holding in *Bullock*. Moreover, the manner in which the determination is made as to who will or will not receive the exemption is utterly arbitrary since the official making the decision may summarily decide the applicant is not a "recognized religious sect".

On the other hand, it can be no less doubtful that there are many religious organizations across the country who have received this exemption, and that it affects thousands of people.[10] Since this exemption, as written, is invalid, and since any determination concerning its validity would have a major impact on many religious communities, this Court should be the one to make that ruling in order to preserve a uniformity of law for the country.

Date: August 1995.

Respectfully Submitted,

Martin H. Droz,
Petitioner In Pro Per

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such recognition is necessarily left to the whim of some low level government official.

[10] As the appellate court noted, after the decision in *Lee*, Congress extended the exemption to situations where the employer and employee are members of a recognized religious sect opposed to social security.

APPENDIX A

UNITED STATES TAX COURT

In the Matter of:	)	
MARTIN H. DROZ,	)	
Petitioner,	)	Docket No. 20958-91
vs.	)	
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent.	)	

Wednesday,
October 14, 1992
Room 1145, 11th Floor
Edward R. Roybal Center &
Federal Building
255 E. Temple Street
Los Angeles, CA 90012

The above entitled matter came on for trial, pursuant to calendar call, at 2:00 p.m.

BEFORE: HON. LARRY L. NAMEROFF
Special Trial Judge

APPEARANCES:

On behalf of the Petitioner:
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Bench Opinion by Special Trial Judge Larry L. Nameroff
Docket No. 20958-91 (Tr. p. 31) October 14, 1992

THE COURT: The Court has decided to render oral findings of fact and conclusions of law, and the following represents the Court's oral findings of fact and conclusions of law.

This case was heard pursuant to the provisions of Section 7443A(b)(3). All section references are to the Internal Revenue Code in effect for the years before the Court, and all rule references are to the Court's rules of practice and procedure.

Respondent determined a deficiency in federal income tax for the taxable year 1988 in the amount of $5,478.98. Respondent determined that such deficiency was attributable to Petitioner's failure to compute and pay self-employment tax on income reported as self-employment income on Petitioner's Schedule C.

Petitioner timely filed a petition with this Court, in which he contends that he is conscientiously opposed to the Social Security system and therefore is exempt from payment of self-employment tax.

Petitioner timely filed his 1988 federal income tax return reflecting self-employment income, but no Schedule SE computing self-employment tax was included therewith. The notice of deficiency was mailed on June 28th, 1991.

On August 7, 1991, Petitioner sent a form 4029, application for exemption from Social Security taxes and waiver of benefits, to the Social Security Administration, Baltimore, Maryland, where it was received on August 12th. Petitioner contends that the application had been requested by Respondent, but no written proof thereof was presented.

The form 4029 was reviewed by Health and Human Services and forwarded to the Internal Revenue Service with a recommendation of nonapproval on March 19, 1992. As of

this date, October 14, 1992, Petitioner's form 4029 has not been approved or denied by the Internal Revenue Service.

The only entry on the form 4029, besides identifying information, is the following statement: "An individual has a right to religious beliefs, whether or not of his belonging to a religious sect (see recent Supreme Court decision enclosed)." This statement appears on the line where applicant is to identify the religious group of which he is a member.

Petitioner is not a member of any formal church. However, we presume without deciding, for purposes of this opinion, that Petitioner's objections to the Social Security system are genuine and based upon religious beliefs.

Section 1401 imposes a tax for each taxable year on the self-employment income of every individual. Section 1402(g)-(1), formerly 1402(h)-(1), provides that an individual may file an application for exemption from self-employment tax if he is a member of a recognized religious sect whose established teachings are opposed to the acceptance of benefits of any private or public insurance which makes payments in the event of death, disability, old age, or retirement.

However, the exemption is granted only if all the following requirements are met: One, the taxpayer adheres to the tenets of the sect, and waives all benefits under the Social Security Act. Two, the sect is opposed to the acceptance of benefits from private or public insurance, and has for a substantial period of time made adequate provisions for its dependent members in lieu thereof. Three, the sect has been in existence since 1950; and four, the taxpayer timely files a form 4029. See Section 1402(g) and Section 1.1402(h)-(1)(a) and (c), the income tax regs.

Exemptions from tax are to be narrowly construed. The statutory exemption described is narrowly drawn and applies only to those taxpayers who have met the aforementioned requirements. Palmer versus Commissioner, 52 Tax Court 310 (1969), and Stradley versus Commissioner, T.C. Memo 1986-

424.

In fact, Petitioner does not contend that he meets these requirements, because he is not a member of an organized or formal sect. Rather, he contends that the requirements deprive him of his right to free exercise of religion, his religion.

These constitutional objections raised by Petitioner have been discussed extensively and rejected in numerous cases. Henson versus Commissioner, 66 Tax Court 835 at 838 through 839, a 1976 case; and Palmer versus Commissioner, cited above.

This Court has previously stated that the Social Security Act has been held to be constitutional, and that this particular tax does not constitute an unlawful encroachment upon the free exercise of a taxpayer's religion. Furthermore, we also conclude that the exemption provisions of Section 1402(h), predecessor of 1402(g), were not unconstitutional as violative of due process of law because they were in keeping with the acknowledged authority of Congress to provide for the overall public welfare through the Social Security Act, and that Congress has great latitude in formulating classification within a taxing statute, and the classifications in Section 1402(h) are not so arbitrary as to be violative of due process of law.

In a case that's remarkably similar to the case before the Court, Hughes versus Commissioner, 81 Tax Court 686, a 1983 case, we stated as follows, at page 687:

"Congress was entitled to distinguish between a member of a recognized religious sect, who is an adherent of established tenets or teachings upon which the conscientious objections are based, and someone whose personal beliefs alone are the basis for the conscientious objection in question. We find no constitutional infirmity in such legislative classifications, notwithstanding the deeply held convictions of the latter, and notwithstanding that Congress could have treated them both alike. Compare Randolph versus Commissioner, 474 Tax Court at 289 and 290; Henson versus Commissioner, 66 Tax

Court 835 at 838 to 840; and Palmer versus Commissioner, 52 Tax Court 310 at 313 to 314."

Now, Petitioner has relied on Frazee versus Illinois Department of Employment Security, 489 U.S. 829, a 1989 case. In that case, the Supreme Court held that the denial of unemployment compensation benefits based on an appellant's refusal to work on Sunday due to religious belief that was not based on the tenets or dogma of an established religious sect violated the First Amendment. However, that case involved the receipt of unemployment compensation benefits and not an exemption from tax, and therefore is not applicable in the instant case.

The other cases cited in Petitioner's trial memorandum basically deal with freedom of religion. Our decision here does not deprive him of his religious right not to receive Social Security benefits. However, we would like to quote the following from another Supreme Court decision, United States versus Lee, 455 U.S. 258, as follows:

"The obligation to pay the Social Security tax initially is not fundamentally different from the obligation to pay income taxes. The difference, in theory, at least, is the Social Security tax revenues are segregated for use only in furtherance of the statutory program. There is no principle to weigh, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.

"If, for example, a religious adherent believes was is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similar valid claim to be exempt from paying that percentage of the income tax. The system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." Citations omitted.

"Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with

the payment of tax affords no basis for resisting the tax."

Now, just for the sake of completeness, we want to address Petitioner's contentions with regard to the form 4029. Section 1.1402(h)-(1)(c)(i)(b) provides that the timely filing of an application for exemption for taxable years ending on or after December 31st 1967 must be made on or before the due date of the income tax return, including any extension thereof, for the first taxable year ending on or after December 31st 1967 for which the taxpayer has self-employment income.

Petitioner has admitted that he had self-employment income prior to 1988, and therefore, under the quoted regulation, his application, form 4029, was untimely. There is an exception to that general rule, which Petitioner has not established he comes within.

Petitioner states the notice of deficiency is invalid because no action was taken on his application, assuming his application to have been timely. We note that the application was filed after the issuance of the notice of deficiency, and Section 1.1402(h)(1)(c)(1) provides that the filing of an application for exemption on form 4029 by a member of a religious group opposed to insurance does not constitute an exemption from payment of tax on self-employment income. And [sic] individual who files such an application is exempt from the tax only if the application is approved by the official with whom the application is required to be filed.

It is the Petitioner's burden to show that he is exempt, and he has failed at that burden. Neither Respondent nor the Department of Health and Human Services has any burden to act on the application, nor explain their failure to act. The only legal remedy Petitioner has is to contest the assertion of the self-employment tax, which he has done here, but unsuccessfully.

To reflect the above, we will enter a decision for Respondent. This concludes the Court's oral findings of fact and conclusions of law.

(Whereupon, at 3:20 p.m., the Bench Opinion was concluded.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN H. DROZ, *Petitioner-Appellant,* v. COMMISSIONER OF INTERNAL REVENUE SERVICE, *Respondent-Appellee.*	No. 93-70049 Tax Ct. No. 20958-91 ORDER AND AMENDED OPINION

Appeal from a Decision of the
United States Tax Court

Submitted July 11, 1994*
Pasadena, California

Filed March 1, 1995
Amended June 1, 1995

Before: Cecil F. Poole and Stephen Reinhardt,
Circuit Judges, and Jack E. Tanner,** District Judge.

Opinion by Judge Poole

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY

Tax/Exemptions/Labor and Employment

The court of appeals affirmed a decision of the United States Tax Court. The court held that denying a self-employment Social Security tax exemption to a taxpayer who has religious objections to the Social Security system, but who does not belong to a religious organization, does not violate the Free Exercise and Establishment Clauses, due process or equal protection.

Taxpayers who earn self-employment income must pay a self-employment tax into the Social Security system. Title 26 U.S.C. § 1402(g)(1) exempts members of religious sects that have tenets or teachings opposed to participation in the Social Security system and that provide reasonable support to their dependent members. An application for exemption must contain a waiver of all Social Security benefits.

Appellant Martin Droz did not pay self-employment Social Security taxes on the ground that he had religious objections to the Social Security system. Droz did not belong to a religious organization, and did not qualify for an exemption from the taxes under § 1402(g). Appellee the Commissioner of Internal Revenue Service determined that there was a tax deficiency attributable to Droz's unpaid self-employment Social Security taxes. The tax court upheld the determination.

Droz appealed, contending that denying him an exemption violated the Free Exercise and Establishment Clauses of the First Amendment and denied him due process and equal protection.

[1] The tax court properly rejected Droz's argument that denying him an exemption violated his First Amendment right to freely exercise his sincere religious beliefs. [2] Compulsory participation in the Social Security system interfered with

Droz's free exercise rights, but was not unconstitutional. Droz does not belong to any religious organization that provides for its dependent members. Thus, permitting him to opt out of the Social Security system would not only threaten the integrity of the system, but would threaten Congress's goal of ensuring that persons who opt out are provided for. [3] The government's compelling interest in a fiscally sound Social Security system would be threatened by granting "myriad exceptions."

[4] The tax court properly rejected Droz's Establishment Clause argument. [5] Section 1402(g) does not discriminate among religious: it accommodates, consistent with the goals of the Social Security system, those who oppose Social Security on religious grounds. Section 1402(g) does not promote some religions over others, [6] and is not facially discriminatory.

[7] Droz was incorrect in arguing that because the government has not demonstrated a compelling reason for exempting some religious groups and not others, § 1402(g) violated his equal protection rights under the Fifth Amendment Due Process Clause. [8] The basis for § 1402(g)'s exemption is secular: to preserve the integrity of the Social Security system and to ensure that all persons are covered by a welfare plan.

[9] The tax court was the appropriate forum for the initial resolution of Droz's claims. There was no due process violation in the government's failure to respond to Droz's application for an exemption.

COUNSEL

Martin H. Droz, pro per, Arcadia, California, for the petitioner-appellant.

Gary R. Allen, Tax Division, United States Department of Justice, Washington, D.C., for the respondent-appellee.

ORDER

Appellant's petition for rehearing is denied.

The opinion filed March 1, 1995 is amended to include the following footnote at the end of the paragraph beginning on page 2293 of the slip opinion and ending on page 2294:

> Until 1990, the law as declared by the Supreme Court was that the First Amendment prevented infringements on the exercise of religious beliefs except when justified by a compelling interest that could not be achieved through less restrictive means. *See Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). Then, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that facially neutral laws would no longer be subject to this level of scrutiny under the First Amendment. However, three years later, the Religious Freedom Restoration Act of 1993 restored the "compelling interest" and "least restrictive means" tests. 42 U.S.C. §§ 2000bb(b)(1), 2000bb-1(b). The Act applies retroactively to federal and state laws, and to the implementation of those laws, adopted before the date of passage. 42 U.S.C. § 2000bb-3; *see Vernon*, 27 F.3d at 1393 & n.1. Because the RFRA restored the test used to consider free exercise challenges before *Smith*, we rely on pre-*Smith* decisions under the Free Exercise Clause in determining whether the denial of Droz's request for an exemption is consistent with the RFRA.

OPINION

POOLE, Circuit Judge:

Martin Droz appeals pro se the tax court's decision upholding the Commissioner's determination of a tax deficiency

attributable to $5,748.98 of unpaid self-employment Social Security taxes for tax year 1988. Droz did not pay the taxes on the ground that he had religious objections to the Social Security system. Because Droz did not belong to a religious organization, he did not qualify for an exemption from the taxes under 26 U.S.C. § 1402(g). That section exempts members of religious sects that have tenets or teachings opposed to participation in the Social Security system and that provide reasonable support to their dependent members. Droz contends that denying him an exemption violates the Free Exercise and Establishment Clauses of the First Amendment and denies him due process and equal protection. We disagree, and we affirm.

I

Taxpayers who earn self-employment income must pay a self-employment tax into the Social Security system. 26 U.S.C. §§ 1401(a)-(b), 1402(b). Section 1402(g)(1) exempts members of certain religious sects:

> An individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, retirement or makes payments toward the cost of, or provides services for, medical care . . . . .

An application for exemption must contain evidence of the applicant's membership in and adherence to the tenets of the sect, and it must contain a waiver of all Social Security benefits. 26 U.S.C. § 1402(g)(1)(A)-(B). In addition, the Secretary of Health and Human Services must find that the applicant's

sect (1) espouses tenets or teachings opposed to the Social Security system; (2) has for a substantial period of time made a practice of providing for its dependent members; and (3) has been in existence since December 31, 1950. *Id.* § 1402(g)(1)(C)-(E).

Droz concedes that he is not a member of a religious sect and is therefore ineligible for a § 1402(g) exemption. He argues, however, that his exclusion from the exemption on the ground that he is not a member of a religious sect violates his constitutional rights in three ways: (1) it violates his free exercise rights under the First Amendment; (2) it requires the government to choose between individuals who share identical religious beliefs in violation of the Establishment Clause; and (3) it denies him due process and equal protection by discriminating against persons with religious beliefs who do not belong to a religious sect.[1]

A. *Free Exercise Challenge*

[1] The tax court correctly presumed that Droz's objections were based upon sincere religious beliefs. *See, e.g., United States v. Lee*, 455 U.S. 252, 257 (1982); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981). The tax court properly rejected Droz's argument that denying him an exemption violated his First Amendment right to freely exercise those beliefs.

To determine whether a government regulation impermissibly burdens an individual's First Amendment right to freely exercise his religious beliefs, a court must decide whether that regulation substantially burdens a sincerely held religious belief; whether the burden is justified by a compelling state

[1]As the government concedes, Droz has standing to raise his claims. *See Texas Monthly v. Bullock*, 489 U.S. 1, 8 (1989); *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984); *see also Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989).

interest; and whether the regulation is narrowly tailored to achieve that interest. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1392 (9th Cir. 1994) (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Thomas*, 450 U.S. at 718).[2]

The controlling case in this analysis is *United States v. Lee*, in which the Supreme Court upheld the imposition of Social Security taxes on an Amish employer who failed to pay the taxes on his own behalf and failed to withhold the taxes from the wages of his Amish employees. 455 U.S. at 254.[3] The Court determined that participation in the Social Security system interfered with Lee's free exercise rights. *Id.* at 258-59. It held, however, that the government had a compelling interest in enforcing participation in the Social Security system in order to insure the "fiscal vitality" of a system designed to serve the social welfare. *Id.* at 259-61. This compelling interest, held the Court, outweighed the burden that participation placed on Lee's religious beliefs. *Id.* at 260-61.

The Court found that § 1402(g) was narrowly tailored to meet the government's objective because

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[2]Until 1990, the law as declared by the Supreme Court was that the First Amendment prevented infringements on the exercise of religious beliefs except when justified by a compelling interest that could not be achieved through less restrictive means. *See Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). Then, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that facially neutral laws would no longer be subject to this level of scrutiny under the First Amendment. However, three years later, the Religious Freedom Restoration Act of 1993 restored the "compelling interest" and "least restrictive means" tests. 42 U.S.C. §§ 2000bb(b)(1), 2000bb-1(b). The Act applies retroactively to federal and state laws, and to the implementation of those laws, adopted before the date of passage. 42 U.S.C. § 2000bb-3; *see Vernon*, 27 F.3d at 1393 & n.1. Because the RFRA restored the test used to consider free exercise challenges before *Smith*, we rely on pre-*Smith* decisions under the Free Exercise Clause in determining whether the denial of Droz's request for an exemption is consistent with the RFRA.

[3]If the plaintiff had been self-employed, rather than an employer, he would have been eligible for a § 1402(g) exemption. *Lee*, 455 U.S. at 256.

> it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. . . . The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Id. at 259-60 (citations omitted).

The Court concluded that

> Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

Id. at 260-61 (citations and footnote omitted).[4]

[2] Under *Lee*, compulsory participation in the Social Security system interferes with Droz's free exercise rights, *id.* at 257, but is not unconstitutional. Droz's case is less compel-

[4]After *Lee* was decided, Congress extended the exemption to situations where the employer and employee were members of a recognized religious sect that opposed the Social Security system. *See* 26 U.S.C. § 3127.

ling than that of the plaintiff in *Lee*, who was a member of a religious organization that met the requirements of § 1402(g). Droz does not belong to any religious organization that provides for its dependent members. Thus, permitting him to opt out of the Social Security system would not only threaten the integrity of the system, but would threaten Congress's goal of ensuring that persons who opt out are provided for (and will not burden the public welfare system). *See id.* at 258-61. Other courts that have addressed this issue have reached this result. *See Olson v. Commissioner*, 709 F.2d 278, 280-82 (4th Cir. 1983); *Kelley v. Terry*, 629 F.2d 572, 572 (9th Cir. 1980) (pre-*Lee* case); *see also South Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1205-09 (6th Cir. 1990) (applying *Lee* and upholding state requirement of mandatory participation in worker's compensation program), *cert. denied*, 498 U.S. 1047 (1991).

[3] Droz's citation to *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989), does not change this conclusion. In *Frazee*, the Supreme Court held that an Illinois state court's denial of unemployment benefits to a person who refused to work on Sundays for religious reasons, but did not belong to a religious sect with tenets prohibiting work on Sunday, violated that person's free exercise rights. 489 U.S. at 830. In *Frazee*, the state's interests would not have been jeopardized by granting an exemption. In the instant case, on the other hand, the government's compelling interest in a fiscally sound Social Security system would be threatened by granting "myriad exceptions." *See Lee*, 455 U.S. at 258-61. Moreover, the statute in *Frazee* put Frazee in the position of choosing between observing his religion and receiving a benefit affecting his livelihood. The denial of a tax exemption is an entirely different burden.

B. *Establishment Clause Challenge*

[4] Droz argues that § 1402(g) violates the Establishment Clause because it distinguishes, based on membership in an

approved sect, among individuals who share identical religious beliefs. This amounts to discrimination among religions, Droz argues, because some individuals receive exemptions, and other individuals with identical beliefs do not. The tax court properly rejected Droz's Establishment Clause argument.

To withstand an Establishment Clause challenge, a statute must have a secular legislative purpose. The statute's primary purpose must neither advance nor inhibit religion, and the statute must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Vernon*, 27 F.3d at 1396-97.

[5] Section 1402(g) does not discriminate among religions: it accommodates, consistent with the goals of the Social Security system, those who oppose Social Security on religious grounds. *See Lee*, 455 U.S. at 260-61; *Hatcher v. Commissioner*, 688 F.2d 82, 84 (10th Cir. 1979); *Jaggard v. Commissioner*, 582 F.2d 1189, 1189-90 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Put differently, § 1402(g) grants a religious exemption, provided that the individual belongs to an organization with its own welfare system. This is not a promotion of some religions over others. It is a religious exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church. In addition, the fact that § 1402(g)'s effect is to neither advance nor inhibit religion is shown by the requirement that a person must waive all Social Security benefits to receive an exemption. 26 U.S.C. § 1402(g)(1).

Droz argues that this court should apply a strict scrutiny analysis, rather than the *Lemon* test, because § 1402(g) involves disparate treatment of different religious sects. *See Larson v. Valente*, 456 U.S. 228, 246, 252 (1982) (strict scrutiny applies to laws discriminating among religions). In *Larson*, the Supreme Court applied strict scrutiny to a statute

governing reporting requirements for charitable organizations which initially exempted all churches from the reporting requirement, but was later amended to exempt only those churches receiving more than 50% of their contributions from members or affiliated organizations. *Id.* at 230-32. The legislative history demonstrated that the statute was drafted with "the explicit intention of including particular religious denominations and excluding others." *Id.* at 254. In concluding that strict scrutiny should apply, the Court noted that the Minnesota statute "makes explicit and deliberate distinctions between different religious organizations." *Id.* at 246 n.23. In *Larson*, the effect of the statute was to discriminate among religions, and *in effect*, the statute was a judgment that some religions were worthy of exemption and others were not. *See id.* at 246, 252-55.

[6] Unlike the statute in *Larson*, § 1402(g) is not facially discriminatory. Instead, it grants a religious exemption subject to a condition — coverage in a private welfare plan. The condition is not intended to discriminate among religions, but is intended to ensure the viability of the Social Security system and the coverage of all individuals in a public or private welfare plan. Thus, the *Lemon* test applies. *Cf. Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (avoiding the *Lemon* test entirely).[5]

[5]We emphasize that our holding is a limited one. We conclude only that § 1405(g)(1)(D)'s limited exemption to people belonging to groups that make provisions for their dependent members does not violate the Establishment Clause. It is undisputed that Droz is not a member of any such group. Therefore it is not necessary for us to decide the constitutionality of any other restrictions contained in § 1405(g) — particularly the provisions limiting the exemption to groups having "established tenets," 26 U.S.C. § 1402(g)(1)(C), and to sects that have been in existence at all times since December 1, 1950. 26 U.S.C. § 1402(g)(1)(E). Nor do we need to decide whether it would violate the Establishment Clause to deny the exemption to people who, though members of no religious sect, are members of another group that makes provision for its dependent members. *See Jaggard*, 582 F.2d at 1190.

C. *Due Process and Equal Protection*

[7] Droz argues that § 1402(g) violates his equal protection rights under the Fifth Amendment Due Process Clause because the government has not demonstrated a compelling reason for exempting some religious groups and not others. This argument fails.

[8] For equal protection purposes, heightened scrutiny is applicable to a statute that applies selectively to religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular. If the basis for the distinction is secular, then this court "review[s] the statute to determine whether it 'classif[ies] the persons it affects in a manner rationally related to legitimate governmental objectives.' " *Weinfeld v. United States*, 8 F.3d 1415, 1419 (9th Cir. 1993) (analyzing Social Security offset to surviving spouse's military pension and quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). As discussed above, the basis for § 1402(g)'s exemption is secular: to preserve the integrity of the Social Security system and to ensure that all persons are covered by a welfare plan. Courts that have addressed due process and equal protection challenges to § 1402(g) have concluded that this justification is rationally related to legitimate governmental objectives. *See Bethel Baptist Church v. United States*, 822 F.2d 1334, 1341-42 (3d Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Templeton v. Commissioner*, 719 F.2d 1408, 1413-14 (7th Cir. 1983); *Ward v. Commissioner*, 608 F.2d 599, 602 (5th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).[6]

[6]As discussed in § I(A) of this opinion, even if a heightened scrutiny applies, the government has articulated a compelling interest to justify the distinction, and the exemption is narrowly tailored to meet that interest.

II

Droz argues that before it addressed his constitutional challenges to § 1402(g), the tax court should have required the IRS to rule on his Form 4029 application for an exemption from Social Security self-employment taxes. Droz argues that he attempted to exhaust administrative remedies by filing an application for exemption, but that the IRS never addressed his application. Droz claims that because he did not know whether and on what basis the IRS would deny his application, it was unfair to require him to argue that his failure to qualify for an exemption violated his constitutional rights.

In addressing this argument, the tax court stated that Droz's application appeared to be untimely. The tax court further held that, even if the application was timely, the IRS was not required to act on it. The tax court reasoned that, because Droz had not demonstrated his entitlement to an exemption, the tax court proceeding provided an adequate forum in which to contest the deficiency and to address Droz's constitutional challenges to § 1402.

[9] The government concedes that the tax court's statement regarding the timeliness of Droz's application was wrong. Nevertheless, we do not believe that the government's failure to render a decision on his application violated Droz' due process rights. In this case, Droz does *not* maintain that he qualifies for an exemption under the statute. His only arguments for an exemption are constitutional and, consequently, were inappropriate for resolution through the resolution procedure described in § 1405(g)(1). The tax court was the appropriate forum for the initial resolution of Droz's claims. Thus, there was no due process violation in the government's failure to respond to his application for an exemption.

Droz also argues that by raising the issue of the timeliness of the application sua sponte, the tax court acted as a de facto attorney for the IRS and thus denied Droz due process. This

argument fails. Droz raised the issue of the IRS's failure to address his application, and in any event, the tax court's remark had no effect on the outcome of the case.

AFFIRMED.

Supreme Court, U.S.
FILED
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No. 95-394

IN THE

Supreme Court Of The United States

October Term, 1995

MARTIN H. DROZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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On Petition For Writ of Certiorari to the
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for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Rutherford Institute respectfully submits this brief as *amicus curiae* in support of the petition for writ of certiorari filed by the petitioner, Martin H. Droz. Pursuant to Supreme Court Rule 37.2, the parties have consented to the filing of this brief. The written consents have been filed with the Clerk of the Supreme Court.

INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is an international non-profit religious legal defense organization named after Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrews University who resisted the idea of the divine right of kings. In his book, *Lex Rex*, Rutherford argued that all people are subject

to the law — including the king. The Rutherford Institute provides *pro bono* defense to religious persons in order to obtain for them equal justice under the rule of law, particularly in cases where the government is a party. The Rutherford Institute is non-sectarian, defending anyone regardless of religious faith.

Formed in 1982, The Rutherford Institute has provided *pro bono* legal defense to religious persons where they experience disparate treatment as a result of membership or non-membership in religious organizations. For example, The Institute represented William Frazee *pro bono* in his case before this Court challenging the denial of unemployment benefits because he was not a member of a recognized religious organization with beliefs regarding Sabbath observance. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). The Institute specializes in litigation in state and federal courts and has participated as counsel in numerous other cases before this Court. Counsel believe their expertise will be of assistance to the Court in this case.

The accompanying brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. *First*, the brief calls to the attention of the Court a conflict with the decision of another United States court of appeals regarding the level of scrutiny applied under the Establishment Clause to laws conditioning the receipt of a government benefit upon membership in a recognized religious sect. *Second*, the brief calls to the attention of the Court an important question of federal law which has not been, but should be, settled by this Court: Does the Religious Freedom Restoration Act of 1993 (RFRA) merely incorporate by reference this Court's pre-*Smith* free exercise jurisprudence? *Third*, the brief calls upon the Court to vacate summarily the Establishment Clause and RFRA portions of the decision of the Court of Appeals and to remand the case for reconsideration of the foregoing issues.

SUMMARY OF ARGUMENT

The First Amendment of the United States Constitution and the Religious Freedom Restoration Act of 1993 prohibit government from conditioning exemptions from public obligations upon membership in a religious organization. In *Frazee v. Illinois Department of Employment Security*, this Court held that a state may not condition the allowance of unemployment benefits upon the claimant's membership in a religious organization teaching Sabbath observance. In *Wilson v. N.L.R.B.*, the United States Court of Appeals for the Sixth Circuit held that Congress could not condition exemption from the payment of union dues upon the employee's membership in a religious organization teaching non-payment of union dues. In this case, however, the United States Court of Appeals for the Ninth Circuit has held that Congress may condition exemption from the payment of Social Security taxes upon the employee's membership in a religious organization opposed to the payment of such taxes. The decision conflicts with the First Amendment of the United States Constitution, the Religious Freedom Restoration Act of 1993, and decisions of this Court and the United States Court of Appeals for the Sixth Circuit.

The decision of the Court of Appeals also fails to give proper scope and dimension to Petitioner's rights under the Religious Freedom Restoration Act of 1993 ("RFRA"). The Court of Appeals determined that pre-*Smith* decisions under the First Amendment are reliable *and controlling* authority for determining Petitioner's rights under RFRA and never considered Petitioner's claim under the particular language of the statute. RFRA mandates, however, consideration of Petitioner's claim in light of the particular language of the statute and Congress' expressed intent to restore the compelling state interest test *as set forth in Sherbert v. Verner* and *Wisconsin v. Yoder*. This Court should remand this case to the Court of Appeals for consideration of Petitioner's rights under RFRA.

The Petition for Certiorari should be granted in light of the reasons set forth in Supreme Court Rule 10.1(a) and (c).

ARGUMENT

I. The decision of the Ninth Circuit conflicts with the decision of another United States court of appeals regarding the level of scrutiny applied under the Establishment Clause to laws conditioning the receipt of a government benefit upon membership in a recognized religious sect.

The decision of the Court of Appeals conflicts with an Establishment Clause decision of the Sixth Circuit applying strict scrutiny to an Act of Congress conditioning an exemption upon membership in a "bona fide" religious organization. *See Wilson v. N.L.R.B.*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992). *Wilson* involved an Establishment Clause challenge to Section 19 of the National Labor Relations Act, 29 U.S.C. § 169. *See* 920 F.2d at 1285. Section 19 of the NLRA exempts from payment of union dues only members of a "bona fide religion, body, or sect which has historically held conscientious objections" to joining or financially supporting labor organizations. *See* 29 U.S.C. § 169.

Although both parties in *Wilson* argued that the statute should be evaluated under the three-pronged Establishment Clause inquiry derived from this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Sixth Circuit concluded that the statute was subject to strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982). 920 F.2d at 1286. The court held that "section 19 facially discriminates among religions because it exempts from union membership only those employees who are members of 'bona fide' religious organizations having the beliefs described in the statute." 920 F.2d at 1287. Applying strict scrutiny, the court held that Section 19 violated the Establishment Clause by exempting "members only" because that provision lacked a compelling governmental interest and could be more closely fitted to accomplish the government's interest

without regard to membership in particular religious organizations. *See id.*

In considering Petitioner's Establishment Clause claim, the Ninth Circuit expressly refused to apply strict scrutiny to a federal law exempting from payment of Social Security taxes only members of a "recognized religious sect" having the beliefs described in the statute. *See Droz v. Commissioner of Internal Revenue Service*, 48 F.3d 1120, 1124 (9th Cir. 1995); 26 U.S.C. § 1402 (g) (1). Like the statute in *Wilson*, however, Section 1402 (g) facially discriminates among religions — it creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.[1] Individual taxpayers having the same beliefs are not entitled to the same benefit.[2]

Therefore, a conflict with a decision of another United States court of appeals exists: the Sixth Circuit applied strict scrutiny under *Larson* to a federal statute exempting only members of recognized religious sects while the Ninth Circuit did not do so. Under Rule 10.1(a) of the Rules of the Supreme Court of the United States, special and important reasons therefore exist for the exercise of the Court's discretion in granting the Petition.

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[1] The reasons stated by the Ninth Circuit for refusing to apply strict scrutiny under Larson (to wit, that Section 1402(g) grants a religious exemption subject to a condition and was not intended to discriminate among religions) would apply to Section 19 of the NLRA as well.

[2] It should be noted that the Ninth Circuit's application of heightened scrutiny to Section 1402 (g) in the context of the Free Exercise claim does not resolve the Establishment Clause question. *Cf. Wilson*, 920 F.2d at 1289-90 (although a legislative exemption may violate the Establishment Clause, the Free Exercise Clause may not require an exemption).

II. The Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court in *Larson*, *Amos*, and *Frazee* by concluding that a law conditioning its applicability upon membership in a religious sect is not subject to strict scrutiny.

Under *Larson v. Valente*, 456 U.S. 228 (1982), the initial inquiry in claims of denominational preference is whether the law facially differentiates among religions. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989); *Larson*, 456 U.S. at 247. If no facial preference exists, then the Court applies the three-pronged Establishment Clause inquiry of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As stated in *Amos*, "*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (emphasis in original).

Section 1402 (g) facially discriminates among religions because it exempts from payment of Social Security taxes only those taxpayers who are members of a "recognized religious sect" having the beliefs described in the statute. Individual taxpayers having the same beliefs are not entitled to the same benefit. Thus, Section 1402 (g) creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.

In considering the Establishment Clause claim, the Court of Appeals expressly refused to apply strict scrutiny to Section 1402 (g). *See* 48 F.3d at 1124. The decision of the Court of Appeals therefore conflicts with the decisions of this Court in *Larson* and *Amos*. The decision also conflicts with the decision of this Court in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). Although *Frazee* was decided in the context of a free exercise claim, the case stands for the proposition that heightened scrutiny applies to governmental

programs conditioning the receipt of benefits upon membership in a religious sect. Therefore, under Rule 10.1(c) of the Rules of the Supreme Court of the United States, special and important reasons exist for the exercise of the Court's discretion in granting the Petition.

III. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court: Does the Religious Freedom Restoration Act of 1993 (RFRA) merely incorporate by reference this Court's pre-*Smith* free exercise jurisprudence?

In deciding the Free Exercise claim, the Court of Appeals recognized the applicability of RFRA but then stated the test as:

> . . . whether [the] regulation substantially burdens a sincerely held religious belief; whether the burden is justified by a compelling state interest; and *whether the regulation is narrowly tailored to achieve that interest.*

48 F.3d at 1122 & n.2 (emphasis added). However, RFRA mandates:

> Government may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person* — (1) is in furtherance of a compelling governmental interest; and (2) *is the least restrictive means of furthering that compelling governmental interest.*

42 U.S.C. § 2000bb-1(b) (emphasis added). Moreover, the Court of Appeals blindly accepted this Court's decision in *United States v. Lee*, 455 U.S. 252 (1982) (a *pre-Smith, pre-*RFRA case), as reliable *and controlling* authority in determining Petitioner's rights under RFRA. *See* 48 F.3d at 1122-23 n.2. Applying *Lee* and its progeny, the Court of Appeals rejected Petitioner's Free Exercise claim. *See* 48 F.3d at 1122-24.

The Ninth Circuit's focus on the *regulation* rather than its *application* and on *pre-Smith* cases rather than on *statutory interpretation* threatens to reduce RFRA to a legislative repudiation of the result in a single case rather than a "sweeping, breathtaking new federal civil rights statute." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 251 (1995). In light of the logic, structure and express provisions of RFRA, Petitioner's free exercise claim is not just a challenge to Section 1402(g)'s limited exemption for "members only" but also an independent claim of right under an exemption statute that applies with full force to the Internal Revenue Code. *See* Paulsen, 56 Mont. L. Rev. at 273 ("Congress did not exempt the tax code from RFRA.").

The Court of Appeals erred in failing to apply the statutory mandate of RFRA to the Government's refusal to accommodate Petitioner's free exercise of religion. Section 1402 contains a myriad of exemptions from the payment of Social Security taxes, including two religious exemptions: one for ministers, members of religious orders, and Christian Science practitioners and one for members of a "recognized religious sect." See 26 U.S.C. § 1402(e) & (g).[3] Under RFRA, a governmental interest cannot be "compelling" where is not uniformly pursued wherever it arises:

> It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order'. . . when it leaves appreciable damage to that supposedly vital interest unprohibited."

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[3] It also should be noted that it is not a crime to refuse to obtain a Social Security number and thereby refuse to participate in the Social Security system.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2234 (1993) (*quoting The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment). Because RFRA incorporates the "compelling interest" test *"as set forth in* Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1963)," 42 U.S.C. § 2000bb(b)(1) (emphasis added), RFRA mandates rigorous application of that test.

United States v. Lee is the "leading exhibit" in the category of pre-*Smith* cases in which the Court watered down the "compelling interest" test to hold that a governmental interest was compelling even though not consistently pursued. *See* Paulsen, 56 Mont. L. Rev. at 266. Given that Petitioner seeks only an individual exemption from the payment of Social Security taxes on the basis of his personal religious beliefs, "the government's assertion of a compelling interest in *mandatory, uniform* participation is belied by the failure of the government to pursue that interest consistently in closely analogous circumstances." *Id.* at 267.

Nor can the limitation of a religious exemption from payment of Social Security taxes only to ministers and members of a"recognized religious sect" become a compelling governmental interest merely because Congress put the exemption into the form of a federal statute. *Id.* at 270-73. RFRA "applies to all Federal ... law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." 42 U.S.C. § 2000bb-3(a). RFRA contains no exceptions to its applicability to the tax code, and Section 1402(g) therefore cannot be accepted as the final word on the appropriate balance between religious liberty and the needs of the Social Security system.

Finally, the costs, inconvenience and difficulty of granting exemptions from the payment of Social Security taxes cannot constitute a "compelling interest" within the meaning of RFRA.

"RFRA is a congressional mandate that federal agencies make the effort, and bear the cost, of accommodating sincere religious exercise, with all the difficulties that that may entail for government." Paulsen, 56 Mont. L. Rev. 274 (emphasis in original). As this Court recognized in *Sherbert*, administrative ease and even the government's interest in a sound public fisc cannot be "compelling interests" until it is proven that individual religious exemptions would pose a grave threat to the Social Security system. Here, as in *Lee*, there is no evidence of how many people may have religious objections to the payment of Social Security taxes, no evidence of how many of them would seek an exemption, no evidence of how an exemption coupled with a waiver of benefits threatens the system, and no evidence that the Social Security system is of "paramount" importance.

The Court of Appeals failed to consider any of the foregoing when it decided that *Lee* was controlling authority in the analysis of Petitioner's rights under RFRA. In short, the Court of Appeals assumed that RFRA merely incorporates by reference the Court's pre-*Smith* free exercise jurisprudence and, by its decision in *Droz*, translated that assumption into controlling federal law for the nine states comprising the Ninth Circuit and persuasive authority for that proposition in the remaining forty-one. The Court of Appeals, in a footnote, thus decided a question of federal law which has not been, but should be, decided by this Court. Therefore, under Rule 10.1(c) of the Rules of the Supreme Court of the United States, special and important reasons exist for the exercise of the Court's discretion in granting the Petition.

CONCLUSION

For these compelling reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed or, in the alternative, summarily vacated by an order also remanding the case to the Court of Appeals for consideration of the issues raised herein under Supreme Court Rule 16.1.

Respectfully submitted,

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November 1, 1995

QUESTION PRESENTED

Whether the exemption provided by 26 U.S.C. 1402(g) from the tax on self-employment income imposed by 26 U.S.C. 1401 violates the Free Exercise Clause or Establishment Clause of the First Amendment or denies equal protection of the law to an individual who is not a member of a religious organization.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-394

MARTIN H. DROZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-30) is reported at 48 F.3d 1120. The opinion of the Tax Court (Pet. App. 10-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1995. A petition for rehearing was denied and an amended opinion was entered on June 1, 1995 (Pet. App. 20). The petition for a writ of certiorari was filed on August 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Individuals with self-employment income are required to participate in the Social Security system and to pay a tax on that income at the combined rates of the Social Security taxes paid by employers and employees on wages. 26 U.S.C. 1401. A narrow exemption from this tax is provided by 26 U.S.C. 1402(g). The exemption is available to "a member of a recognized religious sect" that has "established tenets or teachings" "by reason of which [the member] is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care" (*ibid.*). The statute limits the availability of the exemption to persons who are members of religious sects that "make provision for their dependent members which * * * is reasonable in view of their general level of living" (26 U.S.C. 1402(g)(1)(D)).

Petitioner was self-employed during 1988. He states that he is not a member of any formal church or religious organization but that he has religious objections to the Social Security system (Pet. App. 11-12, 21). When petitioner filed his 1988 federal income tax return, he reported his self-employment income but did not compute or pay the required self-employment tax on that income (*id.* at 11, 20-21). The Commissioner of Internal Revenue therefore issued a notice of deficiency to petitioner, asserting a deficiency of $5,749 in petitioner's 1988 taxes under 26 U.S.C. 1401 (*id.* at 11, 21).

2. Petitioner sought review of the asserted deficiency in the Tax Court (Pet. App. 11). Petitioner

did not dispute that he failed to satisfy the requirements for an exemption from the tax under 26 U.S.C. 1402(g) (Pet. App. 12-13). He contended instead that the requirements that Congress imposed on the availability of that exemption violated the Free Exercise and Establishment Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment.

The Tax Court rejected petitioner's contentions. The court held that the requirement that individuals participate in the Social Security system serves an obvious and compelling secular purpose and does not impede the free exercise of religion (Pet. App. 14, citing *United States* v. *Lee*, 455 U.S. 252 (1982)). The court further held that, in creating a system of social security, Congress properly could distinguish between participation by (i) individuals whose needs independently will be satisfied by an established religious organization and (ii) individuals whose "personal beliefs alone are the basis for the conscientious objection" and who therefore cannot look to others to provide an alternative to the security that the Social Security system provides (Pet. App. 13). The court therefore concluded that the narrowly drawn exemption contained in 26 U.S.C. 1402(g) does not violate the Establishment Clause or deny equal protection of the laws to petitioner (*ibid.*).

3. The court of appeals affirmed (Pet. App. 17-30). The court noted that in *United States* v. *Lee*, 455 U.S. 252, 257 (1982), this Court held that "the government had a compelling interest in enforcing participation in the Social Security system in order to insure the 'fiscal vitality' of a system designed to serve the social welfare" and that this "compelling interest * * * outweighed the burden that participation" may

place on religious beliefs (Pet. App. 23, citing *United States* v. *Lee*, 455 U.S. at 259-261). The court further noted that the carefully drawn exemption contained in 26 U.S.C. 1402(g) is narrowly tailored to protect the government's compelling interest in ensuring broad participation in the Social Security system (Pet. App. 22-25). The court concluded that the exemption does not represent an establishment of religion because it does not promote some religions over others but is instead designed to ensure that all citizens are protected by an organized public or private welfare system (*id.* at 25-27). The court held that the exemption scheme is narrowly drawn to protect this compelling secular purpose and does not violate equal protection or due process of law (*id.* at 28).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. There is no conflict among the courts of appeals on the question addressed and decided in this case. Petitioner simply contends that the decision upholding the statute is wrong, not that it conflicts with any decision of a court holding the statute unconstitutional. Indeed, no case has held this statute to be unconstitutional. Because no conflict exists on the question presented in this case, further review is not warranted.

2. The court of appeals correctly held that application to petitioner of the federal self-employment tax imposed under 26 U.S.C. 1401 is not unconstitutional.

a. The requirement that petitioner pay self-employment taxes does not violate the Free Exercise

Clause of the First Amendment. In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court rejected the claim of an Amish employer that, under the Free Exercise Clause, he should not be required to pay the employer's share of the Social Security tax on the wages of his Amish employees. The Court did not doubt that compulsory participation in the Social Security system may interfere with the free exercise of Amish religious principles; but the Court upheld the statute because the government has a compelling interest in maintaining the fiscal vitality of a comprehensive insurance system for which mandatory participation is indispensable. *Id.* at 258-259. The court of appeals correctly relied on *Lee* in rejecting petitioner's Free Exercise claim in this case (Pet. App. 22-25).

Here, as in *Lee*, application of the tax is in furtherance of the compelling governmental interest in providing funding for a universal security system for the Nation's citizens (Pet. App. 22-25). See *Ballinger* v. *Commissioner*, 728 F.2d 1287, 1290-1292 (10th Cir. 1984); *Olsen* v. *Commissioner*, 709 F.2d 278, 280-282 (4th Cir. 1983). The narrowly drawn exemption from this tax that is provided by Section 1402(g) is consistent with that compelling interest, for it permits individuals to withdraw from the Social Security system only if they are members of a religious organization whose tenets of faith include making provision for the security of its members. 26 U.S.C. 1402(g)(1)(D). A person, such as petitioner, who is not a member of such a protective religious organization thus falls outside both the text and the purpose of the statutory exemption from tax (Pet. App. 25).

The narrowly tailored exemption from tax provided by Section 1402(g) is the least restrictive means for

advancing the government's compelling interest (Pet. App. 20, 23 & n.2).[1] As the court of appeals noted in this case, "[o]ther courts that have addressed this issue have reached this [same] result" (*id.* at 25 citing, *e.g.*, *Olsen* v. *Commissioner*, 709 F.2d at 280-282; *Kelley* v. *Terry*, 629 F.2d 572, 573 (9th Cir. 1980)).[2] No case has concluded to the contrary.

b. The court of appeals also correctly held that the exemption from the self-employment tax provided by Section 1402(g) of the Internal Revenue Code does not violate the Establishment Clause of the First Amend-

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[1] *Amicus* Rutherford Institute contends that the question to be addressed under the Religious Freedom Restoration Act of 1993 is whether the interference with religious freedom "is the least restrictive means" of furthering the government's compelling interest (Am. Br. 7, quoting 42 U.S.C. 2000bb-1(b) (Supp. V 1993)). The court of appeals correctly concluded in this case that the exemption "is narrowly tailored to achieve" the government's compelling interest (Pet. App. 23) and represents the "least restrictive means" of doing so (*id.* at 23 n.2). The suggestion of *amicus* that the court of appeals "erred in failing to apply the statutory mandate" (Am. Br. 8) is simply not correct. See Pet. App. 20 (describing the applicable test to be whether the statute is "justified by a compelling interest that could not be achieved through less restrictive means").

[2] Petitioner's reliance (Pet. 7) on *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989), is misplaced. That case involved a denial of state unemployment benefits to an individual whose religious principles required that he not work on Sundays. The Court concluded that the State's interest would not have been jeopardized by an accommodation of the religious principles of the plaintiff. *Id.* at 835. In *Lee*, by contrast, the Court concluded that the government's compelling interest in maintaining a fiscally sound Social Security program would be threatened by granting "myriad exceptions." 455 U.S. at 258-261.

ment. As the Tax Court explained, in creating a system of social security, Congress properly may distinguish between participation by individuals whose needs independently will be satisfied by an established religious organization and individuals whose "personal beliefs alone are the basis for the conscientious objection" and who therefore cannot look to others to provide an organized alternative to the security that the Social Security system provides (Pet. App. 13). As the court of appeals concluded, the exemption does not represent an establishment of religion because it is designed to promote the secular purpose of ensuring that all citizens are protected by an organized public or private welfare system (*id.* at 28).[3]

Petitioner contends (Pet. 7-8) that the conclusion of the court of appeals cannot be reconciled with this Court's decisions in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), and *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989). Neither of those decisions, however, supports petitioner's claim that an individual must be allowed an election to withdraw from the Social Security system based upon personal religious preferences.

Texas Monthly involved a state sales tax exemption for periodicals and books published or distributed by a religious faith and wholly devoted to the tenets and teachings of the faith; other books and periodicals were subject to the tax. 489 U.S. at 5-6. A divided

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[3] For these same reasons, the exemption does not deny petitioner equal protection of the laws (Pet. App. 13, 26). Although petitioner refers to the Equal Protection Clause in describing the question presented in this case (Pet. i), no separate argument under that Clause is advanced in the petition.

majority of the Court held that this differentiation of literature based upon religious content violated either the Establishment Clause or the Press Clause of the First Amendment. *Id.* at 17; *id.* at 25-26 (White, J., concurring); *id.* at 28 (Blackmun, J., concurring). In *Frazee* the Court held that the State could not deny unemployment compensation to petitioner merely because he refused, based upon sincere religious beliefs, to work on Sunday. 489 U.S. at 832-835. As the court of appeals explained in this case, however, the exemption involved here differs from *Texas Monthly* and *Frazee* because it does not "discriminate among religions" or in favor of religions (Pet. App. 26):

> Section 1402(g) does not discriminate among religions: it accommodates, consistent with the goals of the Social Security system, those who oppose Social Security on religious grounds. * * * Put differently, § 1402(g) grants a religious exemption, provided that the individual belongs to an organization with its own welfare system. This is not a promotion of some religions over others. It is a religious exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church. In addition, the fact that § 1402(g)'s effect is to neither advance nor inhibit religion is shown by the requirement that a person must waive all Social Security benefits to receive an exemption. 26 U.S.C. § 1402(g)(1).

No case has reached a different conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

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